IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30/12/2002

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THE HON'BLE MR.JUSTICE E.PADMANABHAN

WRIT PETITION No.36981 OF 2002
AND
WPMP NO. 55294 OF 2002
....

Master J.Rajkumar
Minor
rep. By his father and natural guardian
Mr.D.Joseph ..Petitioner

-Vs-

1. The Secretary
Educational Department
Government of Tamil Nadu
Secretariat, Chennai-9

2. The Director of Medical Education
Directorate of Medical Education
No.162, Periyar EVR High Road,
Kilpauk, Chennai-10

3. The Secretary
Selection Committee
Directorate Of Medical Education
No.162, Periyar EVR High Road
Kilpauk, Chennai-10 .. Respondents

For petitioner :: Mr.E.Omprakash
for M/s.Ramalingam Associates

For respondents:: Mr.V.r.Rajasekaran Spl.Govt.Pleader

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Writ petition filed under Art.226 of The Constitution of India praying for the issue of a writ of mandamus, as stated therein.

:O R D E R

The writ petitioner, a minor and a physically handicapped, represented by his father has come before this court praying for the issue of a writ of mandamus directing the third respondent to implement 3% reservation for persons with disabilities as ided under The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 and allot MBBS seat to the Petitioner herein for the year 2002-2003.

2. All the respondents have entered appearance through the Special Government Pleader (Education). With the consent of counsel appearing on either side, the writ petition itself is taken up for final disposal.

3. The petitioner, a physically handicapped, who applied for the first year MBBS/BDS course selection was placed as No.5 in the list of candidates selected under the Category of Physically Handicapped Students, was asked to appear for counselling 19.9.2002 for BDS Payment Seat. On verification, the petitioner came to know that he was not allotted MBBS Seat and if at all he may apply for BDS, but on payment category. The petitioner was placed No.5 in the list of handicapped persons selected. B ut, only three students have been admitted to the MBBS course. 3% reservation has not been made in all educational institutions including Medical/Dental and if the said principle is applied 39 seats have to be reserved for handicapped persons in the wh ole of the State. 3% reservation has been made mandatory by the Provisions of the Central Legislation namely, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995.The said Act provides that all Gov ernment Educational Institutions and other Educational Institutions receiving aid from the Government shall reserve not less than 3% seats for persons with disabilities. The said enactment is passed on the World Human Rights Proclamation, to which Ind ia is a signatory. The provision is mandatory and till date, the respondent-State Government has not provided 3% reservation in the admission to Educational Courses in the State. Hence the present writ petition.

4. The petitioner relies upon Section 39 of the said Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. According to the petitioner, the respondents have failed to give effect to the said mandat provision. Ignoring the said mandatory provision only three seats have been reserved which is far less than the reservation provided for in the Central Legislation. The petitioner having secured 285.37 out of 300 marks has been denied and deprived of admission. Hence the present writ petition seeking for a direction to reserve 3% of the seats in all Government Medical colleges established and run by the State and Government aided Medical Colleges and admit him.

5. Per contra, on behalf of the respondents, the third respondent has filed a counter affidavit. According to the third respondent the State Government has approved the admission procedure provided for reservation of certain number of MBBS/BDS se for various special categories for the year 2002-2003 and physically handicapped are one among the categories of the persons for whom three seats are reserved for admission to MBBS course under the Special Category. The petitioner was not selected for admission as he was not within the zone of consideration since he has secured 285.37 marks, while others

admitted, have scored more marks. It is contended that the reservation of 3% seats as provided in the Central Act 1/96 could not be given effect t o in all courses as the Government has to necessarily keep in view the type of course and the suitability of the physically handicapped persons to undergo such courses, such as Medicine.

6. If the extent of disability is more that would put the physically handicapped persons in a disadvantageous position and they would also face practical difficulties in undergoing the medical courses and even continuing their practice after compl g the course. Having regard to such factors, the Government has reserved only 3 seats for physically handicapped for admission to MBBS/BDS course. The physically handicapped persons are given admission subject to their producing a certificate given by the competent Medical Board certifying that the candidate is fit to undergo MBBS Course. The petitioner was not selected as he was not within the zone of consideration. The contention that the petitioner would get admission to MBBS Course if 3% reserva tion was provided is untenable. The petitioner is not entitled for interim direction and that the writ petition has to be dismissed.

7. Heard Mr.Omprakash for M/s.Ramalingam Associates, learned counsel appearing for the petitioner and Mr.V.R.Rajasekaran, learned Special Government Pleader appearing for the respondents.

8. The points that arise for consideration are:-

(A) Whether a writ of mandamus directing the respondents to implement 3% reservation for persons with disabilities in terms of Section 39 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1 to be issued?

(B) Whether the petitioner is entitled to issue of a direction directing the respondents to admit the petitioner for admission under the Category of persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) 95?

9. Before proceeding to consider the legal contentions, it is essential to refer to the factual matrix. The writ petitioner is disabled due to Post Polio Paralysis right limb which has been certified to be of 50% disability. It has also been cert d by the Standing Medical Board of the of the concerned Government Headquarters Hospital that the petitioner has normal blood pressure, mentally normal, no visual or auditory handicaps, no gross speech disorders and he is independent in ambulation with calipers, besides he has good standing balance. It has also been certified by the Medical Board that his hands functions with normal limbs without any aid, he has good control over bowel and bladder and that the disease which the petitioner has suffe red is non progressive.

10. The Medical Board has certified that the petitioner is fit to undergo MBBS course. With the said certificate, the petitioner has applied for admission to the first year MBBS course. Even though he was placed as No.5 in the Waiting List, in the cial category, viz, physically handicapped, he could

not secure admission for MBBS, but he was offered a seat in BDS in payment category. Therefore there is no quarrel or controversy that the petitioner though physically disabled is fit to undergo th e study in Medicine leading to MBBS Degree.

11. As seen from the Prospectus for the year 2000-2003, the petitioner is possessed of the minimum eligibility marks and he has also faired well in the Entrance Examination. Clause 13 of the Prospectus prescribes a reservation for the special cat ies in Government Colleges. As per Clause 13 (XI), three seats have been reserved for physically handicapped persons in MBBS Course. The eligibility condition being that the handicapped should produce a certificate from the District Medical Board of the area concerned constituted for this purpose assessing the nature and the extent of physical disability in the format prescribed in the Annexure-XII.

12. As seen from the Prospectus, three seats alone have been reserved under the special category. The three seats is one of the special category in other special category seats reserved for children of freedom fighters, for children of defence p nnel, for children of police personnel who died in heroic action, for widows, seats for children whose parents worked for Enrichment and propagation and development of Tamil language, seats reserved for deserted women, seats reserved for children bo rn out of inter caste marriage, seats reserved for orphans, seats reserved for children of medical department who lost their lives on account of infection, radiation, chemical reaction due to occupational hazards in Government hospitals, seats reserved f or recipients of Anna Award who were disabled due to valour, seats reserved for National Cadet Corps, seats reserved for candidates of Tamil Nadu origin settled in Andaman and Nicobar Islands, seats reserved for Srilankan Tamil among Srilankan Refugees s tudents.

13. The total number of seats in 11 medical colleges in the State is 1255. According to the petitioner, 39 seats have to be reserved for physically handicapped subject to their being certified as being eligible for admission. It is also brought to notice of the court that 12 seats allotted for children born out of inter caste marriage as per clause 13 VIII of the Prospectus has already been held unconstitutional and therefore those seats are available. The petitioner having been placed as No.5 in the Waiting List could very well be accommodated among the seats already reserved for persons born out of inter-caste marriages. In this respect the counsel for the petitioner relies upon the Full Bench Judgement of this Court in 2002 (4) CTC 449 (Aarth i Vs. State of Tamil Nadu).

14. In all about 15 categories which include some special categories, 71 seats as seen from the prospectus are reserved under the special category. As a percentage of the total number of 1255 seats, the seats reserved for special category works out 5.6% as has been pointed out by the Full Bench. While considering the candidates who claimed reservation viz., children born out of inter caste marriage, the Full Bench laid down that as the State has already exercised its legislative power in the f ield by enacting Act 45 of 1994, the executive power of the State would no longer be available to create additional special category or to add to the quantum of reservation provided for in any

of the classes covered by Article 15(4). In that view of the matter, the Full Bench held that such reservation is an illegality. But the Full Bench has issued a direction that the 12 seats shall be redistributed among the students who belong to OC, B.C., MBC, de-notified communities and SC, ST in the ratio of 31%,30%,20%,18% and 1% respectively.

15. The Tamil Nadu Backward Class, Schedule Caste and Schedule Tribe (Reservation of Seats in Educational Institutions and of Appointments or Posts in the services under the State) Act 1993 (Tamil Nadu Act 45/94) provides 69% reservation leaving onl % to open category. The said enactment is the subject matter of challenge before the Apex Court. The said enactment provides for reservation as detailed hereunder: Backward Classes :: 30% Most Backward Classes :: 20% Scheduled Caste :: 18% Scheduled Tribes :: 1%

16. It is to be pointed out that no provision has been made in the said Enactment in respect of disabled or other special category and no part of the State Legislation has made a provision for reservation for the disabled either into Educational itutions or in the employment. Therefore the said enactment will not in any manner be a answer to the petitioner's claim.

17. Article 15(4) enables the State for making a special provision for the advancement of any socially and educational backward classes of the citizens or for SC and ST notwithstanding the clause (2) of Art.29.

The Apex Court in M.R.Balaji Vs. State of Mysore, reported in AIR 1963 SC 649 held thus: "Therefore, what is true in regard to Article 15(4) is equally true in regard to Article 16(4). There can be no doubt that the Constitution makers assumed, as they were entitled to that while making adequate reservation under Article 16(4), care wou e taken not to provide for unreasonable, excessive or extravagant reservation, for that would, by eliminating general competition in a large field and by creating widespread dissatisfaction amongst the employes, materially affect efficiency. Therefore, l ike the special provision improperly made under Art.15(4), reservation made reservation made under Article 16(4) beyond the permissible and legitimate limits would be liable to be challenged as a fraud on the Constitution".

18. In this writ petition the learned counsel appearing for the petitioner heavily relies upon the Central Legislation namely, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995,(Act 1/96). S on 39 of the said enactment reads thus:"39. ALL EDUCATIONAL INSTITUTIONS TO RESERVE SEATS FOR PERSONS WITH DISABILITIES: All Government educational institutions and other educational institutions receiving aid from the Government shall reserve not less than three per cent seats for persons with disabilities."

19. The learned counsel while referring to Chapter VI of the Act contended that Section 39 is mandatory and the State has to reserve not less than 3% seats for persons with disabilities. In other words, it is contended that reservation shall not ess than 3% for persons with disabilities in Government

Educational Institutions and other Educational Institutions receiving aid from the Government. It is contended that Section 39 is mandatory and the failure on the part of the State Government to g ive effect to Section 39 has given the cause of action for the present writ petition.

20. The expression "Disability" has been defined in Section 2(i) and it reads thus: (i) Disability means (i) blindness; (ii) low vision; (iii)leprosy-cured (iv) hearing impairment; (v) locomotor disability; (vi) mental retardation; (vii)mental illness;

21. Section 26 directs that the Appropriate Government and the local authorities shall ensure that every child with disability shall have access to free education and also promote setting up of special schools in Government and Private Sectors. Wh Sections 32,33,34 and 38 of Chapter VI (Employment) refers to the Appropriate Governments and local authorities shall make provisions as directed in the respective sections, but to the contra distinction, Section 39 mandates all Government Educational Institutions and other educational institutions receiving aid from the Government to reserve not less than 3% seats for persons with disability.

22. Section 2 (a) defines the expression Appropriate Government". However Section 39 in contra distinction mandates that all Government Educational Institutions and other educational institutions receiving aid from the Government, which is a speci rovision enacted with the intendment to give equal opportunities, covering all the educational institutions including educational institutions established and run either by the State or Central Government.

23. The object of the Act being to provide equal opportunities as has been adopted by the Asian and Pacific Decade of Disabled Persons Convened by the Economic and Social Commission for ASIA and Pacific held at Beijing on 1st to 5th December, 19 nd adopted the Proclamation on the Full participation and Equity of People with Disabilities. To such convention, the Government of India is a signatory and to achieve the said obejct the Legislation has been brought in.

24. The enactment, namely, The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, was the subject matter of consideration by the Apex Court in Javed Abidi Vs. Union of India reported in AIR 1999 512, where the Apex Court directed the Union of India and others to grant concession to physically disabled in Airlines as is being granted in Railways. The Apex Court in this respect issued a direction as prayed for in respect of physically disabled.

25. A Division Bench of this court in Vijayakumar Vs. High Court of Judicature, Madras reported in 1999 Writ L.R 219, while considering the challenge to the appointment of Librarian in the High Court considered the scope of the said Enactment 1995 t 1/96) and held that the Parliament has with intention to provide for the following, as apparent from the Statement of Objects and Reasons, enacted the legislation: (i) to spell out the responsibility of the State towards the prevention of disabilities, protection

of rights, provision of medical care, education, training, employment and rehabilitation of persons with disabilities; (ii) to create barrier free environment for persons with disabilities; (iii)to remove any discrimination against persons with disabilities in the sharing of development benefits, vis-a-vis non disabled persons; (iv) to counteract any situation of the abuse and the exploitation of persons with disabilities; (v) to lay down strategies for comprehensive development of programmes and services and equalisation of opportunities for persons with disabilities; and (vi) to make special provision for the integration of persons with disabilities into the social mainstream."

26. As rightly pointed out, in terms of Section 39 of the Central Act, 1/96, 3% seats have to be reserved for physically handicapped persons subject to their fitness or suitability and eligibility to undergo the courses. The State has not made any rvation as mandated by the Central Enactment, but it has just provided three seats in all as against 1255 seats in Government Medical Colleges. To comply with Section 39 the total seats required to be reserved for physically disabled will be not l ess than 39 seats. In other words 39 seats should have been reserved for physically disabled out of total 1255 seats, while the State Government has reserved only three seats in all as a special category.

27. It is the statutory requirement that the State Government is bound to enforce the said Section 39. No other provision to the contra has been brought to the notice of the Court by the learned Special Government pleader. Section 73 of the of the ral Enactment provides that the Appropriate Government may make Rules to carry out the provisions of the Act and in particular to various provisions enumerated in Section 73.

28. It is not the contention of the respondents that they have reserved seats as mandated by Section 39. But the learned Special Government Pleader contended hat the word "shall" appearing in Section 39 has to be read as directory and not mandat Such a contention in the considered view of this court cannot be countenanced as such a reading will defeat the very object of the Section as well as Central Enactment. In terms of Section 39, it is obligatory for all the Government Educational Institut ions to reserve 3% seats for physically disabled.

29. The State Government has taken up the policy of reservation in terms of State Enactment, namely The Tamil Nadu Backward Classes, Scheduled Caste and Scheduled Tribes, (Reservation of Seats in Educational Institutions and of Appointments of Po in the Services under the State) Act, 1993 and the Central Enactment being later in point of time, which provides for reservation in respect of disabled and there being no provision in the State enactment in this respect, the State Government and all the Government Educational Institutions should reserve 3% of the seats for physically disabled.

30. However, this does not mean that every physically disabled person should be admitted irrespective of nature or extent of disability or without reference to eligibility or suitability. It is for the State to prescribe the suitability and eligibi of such physically disabled candidates who seek

admission as against 3% seats reserved for disabled. This provision being a mandate by the Parliament and the Legislation is binding on all the Government Educational Institutions or aided institutions and the respondents should have given effect to that from the date on which the Central Act came to be notified. Therefore, it follows that the petitioner is entitled for a direction directing the Respondents to reserve 3% of the total seats for the dis abled subject to the individual candidate being found suitable to undergo the particular course of study.

31. Admittedly, the State has already reserved three seats only as against 39 seats, which is required to be reserved for the disabled in terms of Section 39 of the Central Act 1/96. The State has also prescribed the Format in which the certifica as to be secured from the Medical Board in this behalf even in respect of students who desire to undergo the course of Medicine. The petitioner has been certified to be fit to undergo the course of Medicine leading to conferment of MBBS Degree, as cer tified by the Medical Board. In fact, accepting the certificate only the petitioner has been placed as No.5 in the waiting list. The petitioner has not been admitted as the total number of seats reserved in this special category being only 3 as agai nst 39 seats required to be reserved. The petitioner has a definite chance of admission if 39 seats have i been earmarked for disabled.

32. The Central Act 1/96 is a Legislation brought in furtherance of Art.41 of The Constitution of India which provides that the State shall make effective provision for securing the right to work, to education and to public assistance i of unemployment of disabled among others. When the Parliament has undertaken the Legislation and it has been brought into force, it is incumbent on the part of the every educational institutions established and run by the State or receiving aid to res erve not less than 3% seats for persons with disabilities.

33. The said Legislation and in particular Section 39 relates to education which falls under Entry 25 (Concurrent List) Schedule VII of List III. Therefore the Parliament is competent to enact providing for education or provide for reservation in ed ional institutions which is a concurrent subject. That apart, in terms of Art. 246(2) read with Art.254, the provisions of the Central Act 1/96 will prevail over the administrative Order by which the State Government has reserved three seats in all for disabled. The enactment in question and in particular Section 39 has the force of law and it is binding and it is enforceable. Therefore the petitioner is entitled to the relief of mandamus as prayed for.

34. In terms of Section 39, all Government Educational Institutions and other educational institutions receiving aid from the Government shall reserve not less than 3% seats for persons with disabilities. It is in effect a reservation, which is itution based. It means that each and every Government Educational Institutions or Institutions receiving grant or aid shall reserve 3% seats in every branch of study or course for persons with disabilities. This reservation being a special reservatio n, it is not subject to The Tamil Nadu Backward Classes, Scheduled Caste and Scheduled Tribes, (Reservation of

Seats in Educational Institutions and of Appointments of Posts in the Services under the State) Act, 1993. Only after reserving 3% seats in Government Educational Institutions or aided Institution the balance alone is to be subjected to further reservation either for SC or ST or BC as the case may be.

35. Being a reservation institution wise, the State Government has to work out the 3% in respect of each Medical College or any other professional college or other institutions run by the State or institutions which are receiving aid from the S , be it State Government or Central Government, they shall reserve 3% of the total admission capacity in each branch or course of study.

36. However, at the same time, it has to be made clear that 3% reservation for disabled should be subject to the individuals eligibility and suitability to prosecute the course in the particular branch of study. In other words, a person who is lly disabled and who is not able to undertake the particular branch of study or professional course cannot claim the benefit of reservation. The disabled candidates should be with such extent of ability or suitability or eligibility to undergo the cours e and/or the nature of disability which may not interfere with his prosecuting the particular branch of study or professional course.

37. In respect of Professional courses the State Government has already fixed the suitability of disabled and also provided that the candidates should subject themselves for an examination before the Competent Medical Board prescribed in this b f and the Medical Board has to certify that the candidate is suitable to undergo or prosecute the particular branch of study or course as the case may be. If in the opinion of the Expert Body the disabled candidate is unfit to undergo or prosecute the st udy in the particular branch or professional course, as the case may be, then the disabled cannot compel such State or aided Institution to admit them against the 3% quota irrespective of the percentage of disability or total physical disability, as the case may be.

38. It is not the contention of the Mr.V.R.Rajasekaran, learned Special Government Pleader that the Central Act has no application at all. But what is contended is Section 39 is not mandatory and only directory and therefore the provision Three sea n all would satisfy the requirement of Section 39. This argument cannot be countenanced. No other argument has been advanced by the Counsel for the State. Therefore the contention advanced by the counsel for the petitioner deserves to be accepted and a m andamus has to be accepted.

39. Accordingly, the State Government is directed to reserve 3% seats in all Government Educational Institutions or Government aided Educational Institutions in the State in all courses of study for physically disabled. It is for the State Gover t to prescribe the conditions for the disabled being suitable for such course and the percentage of disability, besides providing guidelines in respect of admission to various professional courses. In this respect the State has already prescribed the standards among the disabled who are eligible to be admitted. The State Government having announced its determination to rehabilitate physically handicapped persons by reserving

seats in the Government Medical Colleges, it is bound to implement Sec.39 o f Central Act 1 of 1996.

40. The petitioner is a disabled and he is eligible to be admitted as seen from the fact that he has produced a certificate and his name has been included in the waiting list in the admission for the first year MBBS. In the circumstances, the writ tion is allowed and the rule nisi is made absolute. This court directs the respondents to forthwith admit the petitioner to the first year MBBS course as against 39 seats reserved for disabled.

41. In respect of other disabled persons, if any, this court is not issuing any direction for the current year, but makes it clear that for the future the State Government shall implement Section 39 of the Central Act 1/96 namely, The Persons wit sabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, in respect of all educational institutions established and run by the State Government as well as all Government aided educational institutions by issuing necessary orders in this behalf on or before 30th March of 2003. But such reservation shall be subject to the State fixing such physical standards as it may enable the disabled to undergo the particular branch of study or course of study. It is needless to add that in respect of Admission to various courses the State has to modify its notification in compliance with Section 39 of the Act.

42. In the result, both the points are answered in favour of the petitioner. The respondent shall admit the petitioner within a period of two weeks from the date of communication of this order.

43. Writ Petition is allowed. The parties shall bear their respective costs. Consequently, the connected WPMP is closed.

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To
1. The Secretary Educational Department Government of Tamil Nadu Secretariat, Chennai-9

2. The Director of Medical Education Directorate of Medical Education No.162, Periyar EVR High Road, Kilpauk, Chennai-10

3. The Secretary Selection Committee Directorate Of Medical Education No.162, Periyar EVR High Road Kilpauk, Chennai-10

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